there are cases where this has been done, in my opinion the rule laid down by the House of Lords in the case of *Davies v. Director of Public Prosecutions*[1] should be followed, as it was by Murray-Aynsley C.J. in *Tan Yook Suan v. Reg.*[2]. One of the propositions there laid down (*per* Lord Simon L.C. at page 513) is this :—

"Where the Judge fails to warn the jury in accordance with this rule the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice, unless the Appellate Court can apply the proviso to section 4 of the Criminal Appeal Act, 1907."

In applying this rule to appeals from Magistrates' Courts in this country I would substitute for the last part of the sentence above quoted the following :—

"Unless the Appellate Court is satisfied that such failure has not occasioned a failure of justice within the meaning of section 448 of the Criminal Procedure Code."

The question of accomplice evidence was not the only difficulty in this case. No evidence was called and no attempt was made to identify the names "Koay Ah Sian" and "Koay Sian Nee" appearing in the written document with the appellant Koay Chooi. Moreover, only one of the witnesses to the document who was called gave evidence that the appellant signed the document produced, and this evidence was given in very general terms, when the witness said :—

"Then they all signed or put their thumb impression".

So that the question whether this document constituted corroboration was also left to a large extent in the air.

In all the circumstances of this case I was far from satisfied that there was ample corroboration of the evidence of these witnesses who at least appear to have been accomplices. I use the expression "appear to have been" advisedly because if the learned Magistrate had set his mind to the point he might, after seeing and hearing these witnesses, have concluded that some of them were not accomplices.

Owing to the failure of the learned Magistrate to direct himself on the question of whether these witnesses were accomplices and if so whether there was corroboration I felt I had no alternative but to set aside the conviction. I therefore ordered that the appellant be retried before another Magistrate.

Re-trial ordered.

Solicitors for the appellant: *Ong Huck Lim & Co.*

ARIFFIN MOHAMED ARIFF v. REGINA

[A. Cr. J. (Spenser Wilkinson J.) August 16, 1955]

[Penang — Criminal Appeal No. 24 of 1955]

Criminal Procedure Code (Cap. 21), s. 74 — Binding over a complainant — Need for positive evidence that complainant is likely to commit a breach of the peace.

In this case the accused in the proceedings was charged with assault upon the complainant. The accused was the caretaker of a mosque of which the complainant was the manager. It appeared that the quarrel between them arose because the complainant had given permission to his niece to stay for a few days in the Imam's room at the mosque, of which he was the manager. The defendant objected to this on the ground that in his view under Islamic law no woman can live in a mosque. When the complainant gave evidence he was cross-examined by Counsel for the accused who suggested to him, *inter alia*, that under Islamic law no woman could live at a mosque and that he (the complainant) was in fact the aggressor. These matters the complainant definitely denied. There was no proof of the law or custom alleged by the accused. The learned Magistrate bound over the complainant under s. 74 of the Criminal Procedure Code. The complainant appealed against this order.

Held: an order under s. 74 of the Criminal Procedure Code must be based upon positive evidence that the complainant unless restrained is likely to cause a breach of the peace and cannot be based upon suggestions put to a witness in cross-examination which that witness repudiates or upon submissions made by Counsel unsupported by evidence.

MAGISTRATE'S CRIMINAL APPEAL.

Appellant in person.

D. C. Jackson (Sr. Federal Counsel) for the respondent.

Spenser Wilkinson J. : — This was an appeal by the complainant in proceedings in the Magistrate's Court against an order by the learned Magistrate binding him over under section 74 of the Criminal Procedure Code in the sum of $50 for six months to keep the peace.

The accused in the proceedings was the caretaker of a mosque of which the complainant is the Manager. He was charged with assault upon the complainant under section 352 of the Penal Code. The quarrel between the complainant and the accused arose out of the complainant having given permission to his niece to stay for a few days in the Imam's room at the mosque, of which he was the Manager. The defendant objected to this upon the ground that in his view under Islamic law no woman can live at a mosque.

The complainant when he gave evidence was cross-examined at considerable length by Counsel, who quite properly put a number of suggestions to him, amongst them being that under Islamic law no woman could live at a mosque and that he the complainant was in fact the aggressor. These matters the complainant definitely denied. Suggestions of this kind made to a witness in cross-examination may well affect his credit by reason of the manner of his denial or his general demeanour when under cross-examination; but even if the witness is completely discredited this does not prove the suggestions made to him (unless he admits them) or even make them evidence. There was thus no evidence before the learned Magistrate with regard to the Islamic custom alleged and yet he found as a fact that the appellant's action in allowing the woman to go

and live in the Imam's room at the mosque was to complainant's knowledge an improper action to take, being repugnant to Islamic custom and that it must meet with disapproval of the mosque caretaker. Whether or not the action of the complainant was in fact contrary to Islamic custom I do not know and I express no opinion upon the point. It may well be so but such customs must be proved.

I think the learned Magistrate has confused matters put to a witness in cross-examination and submissions made by Counsel with evidence. He appears to have overlooked the fact that upon the evidence given the accused was the caretaker of the mosque and was employed by the complainant.

The provisions of section 74 of the Criminal Procedure Code are useful provisions, but in my opinion should only be used in cases where it is clear that upon the evidence given unless restrained the complainant is likely to cause a breach of the peace. In any event an order under this section must be based upon positive evidence and cannot be based upon suggestions put to a witness in cross-examination which that witness repudiates, or upon submissions made by Counsel unsupported by evidence.

For these reasons I came to the conclusion that the learned Magistrate's order was wrong and I, therefore, set it aside.

Order accordingly.

PUBLIC PROSECUTOR v. CHOONG SING

[A. Cr. J. (Thomson J.) August 19, 1955]

[Ipoh — Criminal Appeal No. 6 of 1955]

Common Gaming Houses Ordinance, 1953, s. 4(1)(b) — Amusement Park — Permitting premises to be used as a common gaming house — What constitutes permitting.

This was an appeal by the Public Prosecutor against the acquittal of the respondent, who was the owner of an Amusement Park, on a charge of permitting premises to be used as a common gaming house in contravention of s. 4(1)(b) of the Common Gaming Houses Ordinance. The learned Magistrate in his grounds of judgment said: "It was necessary to shew either that the accused had specifically given permission for the amusement park to be used for gaming or that he was aware that it was being so used and had not stopped it."

Held: to sustain a charge of permitting premises to be used as a common gaming house, it is not necessary to prove actual knowledge in the sense of seeing or knowing by the persons charged. It is enough if there are circumstances from which it may be inferred that he or his servants had connived at what was going on.

Cases referred to :—

(1) *Somerset v. Wade* (1894) 1 Q.B. 574, 576.
(2) *Redgate v. Haynes* (1875–6) 1 Q.B.D. 89, 94.
(3) *Bosley v. Davies* (1875–6) 1 Q.B.D. 84.
(4) *Somerset v. Hart* (1883–4) 12 Q.B.D. 360, 364.
(5) *Bond v. Evans* (1888) 21 Q.B.D. 249, 252.

MAGISTRATE'S CRIMINAL APPEAL.

A. P. Jack (Federal Counsel) for the appellant.

Respondent in person.

Thomson J. (delivering oral judgment) : — The respondent in this case at the material time was the owner of premises described as an Amusement Park and he was prosecuted on a charge of permitting the premises to be used as a common gaming house in contravention of section 4(1)(b) of the Common Gaming Houses Ordinance, 1953. At the same time, six persons in his employment were charged with assisting in the management of a common gaming house in contravention of section 4(1)(c). Quite properly the charge against the accused and against the persons in his employment were tried together. In the event (I do not find it necessary to discuss this part of the case) the learned Magistrate was satisfied that the premises in question did constitute a common gaming house and he proceeded to convict the six persons who were charged with assisting in its management. Against these convictions there has been no appeal.

As regards the respondent, however, he acquitted him and against that Order of acquittal the Public Prosecutor has now appealed.

The only ground of appeal is that the learned Magistrate erred in law in that he applied certain wrong principles to the assessment of the evidence. In discussing the case against the respondent he said that in order to justify a conviction failure to take adequate steps to prevent gaming was not enough to make out the offence charged, and, here I quote his words :—

"It was necessary to shew either that the accused had specifically given permission for the amusement park to be used for gaming or that he was aware that it was being so used and had not stopped it."

On that basis, he proceeded to consider the evidence and came to the conclusion that the respondent should not be convicted.

In my judgment, the learned Magistrate applied an unduly narrow principle in his consideration of the case and one which cannot be supported on authority.